

Chapter 13

Procedure for Less Charge Demand

1. Introduction:

- 1.1 The Customs Act, 1962 mandates filing of correct declaration by importers or exporters in respect of imported / export goods in regard to value, description of goods, classification, exemption notifications having bearing on assessment of Customs duty etc. The Customs duty is determined in terms of Section 15 or section 16 of the Customs Act, 1962 in respect of imported or export goods. If the duty paid / levied is found to be less than the due, the importer or exporter is required to pay the short levied / non levied or short paid / non paid amount of duty. In this regard, the Customs Act, 1962 empowers officers to issue a demand cum Show Cause notice for recovery of amount of duty short levied/ non levied from the importer/exporter.

2. Legal provisions:

- 2.1 Section 28 of the Customs Act, 1962 provides for recovery of any duty which has not been levied or has been short levied or erroneously refunded or if any interest payable has not been paid, part paid or erroneously refunded provided a notice demanding such duties/ interests is issued within the time limit specified in that Section. Where the short levy is by reason of collusion or any willful misstatements or suppression of facts by the Importer the period for issuing the demand notice is five years from the relevant date specified in Section 28.
- 2.2 Section 28(5) of the Customs Act, 1962 provides that the importer or the exporter or the agent or employee of the importer or exporter, to whom a notice is served under the Section 28(4) of the said Act pays the duty in full or in part as may be accepted by him, and the interest payable thereon under Section 28AA of the said Act and penalty equal to 25% of the duty specified in the notice or the duty so accepted by such person within 30 days of the receipt of the notice. In such case if such person has paid the duty in full together with interest and penalty, the proceedings in respect of such person and other persons to whom notice is served shall, without prejudice to the provisions of Sections 135, 135A and 140 of the said Act, be deemed to be conclusive as to the matters stated therein.

3. 'Proper officer' for the Sections 17 and 28 of the Customs Act, 1962:

- 3.1 To address the issue of validity of Show Cause Notices issued prior to 6-7-2011, which were adversely impacted by the judgment of the Hon'ble Supreme Court, in the case of *Syed Aii vs Commissioner and others*, the Customs (Amendment and Validation) Act, 2011 on 16-9-2011 amended Section 28 of the Customs Act, 1962 by inserting clause (11), which reads as follows:

“(11) Notwithstanding anything to the contrary contained in any judgment, decree or order of any court of law, tribunal or other authority, all persons appointed as officers of Customs under sub-section (1) of section 4 before the sixth day of July, 2011 shall be deemed to have and always had the power of assessment under section 17 and shall be deemed to have been and always had been the proper officers for the purposes of this section.”

- 3.2 The amended Section 28 of the Customs Act, 1962 validates Show Cause Notices issued

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prior to 6-7-2011 by officers of Customs, which would include officers of Commissionerates of Customs (Preventive), Directorate General of Revenue Intelligence (DRI), Directorate General of Central Excise Intelligence (DGCEI) and similarly placed officers by retrospectively recognizing these officers as 'proper officers' for the purpose of Sections 17 and 28 of the said Act. However, it is decided that the officers of DRI and DGCEI shall not adjudicate the Show Cause Notices issued under Section 28 of the said Act.

[Refer Circular No.44/2011-Cus, dated 23-9-2011]

- 3.3 As a prospective remedial measure, in terms of Section 2(34) of the Customs Act, 1962, the Board has issued Notification No.44/2011-Customs (N.T.), dated 6-7-2011 by virtue of which officers of DRI, Commissionerates of Customs (Preventive), DGCEI and Central Excise Commissionerates were assigned the functions of the 'proper officer' for the purposes of Sections 17 and 28 of the said Act.

4. Adjudication proceedings:

- 4.1 Show Cause Notice for demand of duty under Section 28 of the Customs Act, 1962 can be issued by respective adjudicating officers depending upon the powers of adjudication.
- 4.2 Upon receipt of the notice's reply to a demand notice the matter is examined in detail and the noticee is offered an opportunity of 'personal hearing' to explain his case before the adjudicating authority. After the personal hearing the adjudicating authority shall examine the material placed before him and the relevant legal provisions and come to a conclusion. Generally, the issues involved are mis-declaration of the description of the goods resulting in wrong classification and levy of lesser duty, mis- declaration of value, quantity and weight having a bearing on duty, calculation error resulting in short levy of duty, non inclusion of certain components of value in the assessable value etc.
- 4.3 The adjudicating authority is required to take an independent decision as an quasi- judicial authority and pass appropriate orders either determining the amount of short levy in terms of Section 28(8) of the Customs Act, 1962 or dropping the proceedings where it is found that there is no short levy. In either case an appealable order is to be issued by the adjudicating authority. The duties, fines and penalties imposed, if any, are required to be paid immediately, unless the party files an appeal and obtains a stay from the competent authority.
- 4.4. In order to streamline guidelines on monetary limit for adjudication of cases by different grades of Customs Officers, Board decided that cases where SCNs are issued under section 28 of the Customs Act, 1962, these will be adjudicated as per following norms:

Adjudicating Officer	Nature of Cases	Amount of Duty Involved
Commissioner	All cases	Without limit
ADC/JC	All Cases	Upto Rs.50 lakhs
AC/DC	All cases	Upto Rs. 5 lakhs

- 4.5 Further, the proper officer for the issuance of Show Cause Notice and adjudication of cases under the provisions of Rule 16 of the Customs, Central Excise and Service Tax Drawback Rules, 1995 shall be as under:

- (i) In case of simple demand of erroneously paid drawback, the present practice of issuing Show Cause Notice and adjudication of case without any limit by Assistant / Deputy Commissioner of Customs shall continue.
- (ii) In cases involving collusion, wilful misstatement or suppression of facts etc., the adjudication powers will be as under:

Adjudicating Officer	Amount of Drawback
Additional / Joint Commissioner of Customs	Without limit
Deputy / Assistant Commissioner of Customs	Upto Rs.5 lakhs

- 4.6 In case of Export Promotion Schemes i.e. Advance Authorization / DFIA / Reward Schemes etc. the adjudication powers shall be as under:-

Level of Adjudicating Officer	Duty Incentive amount
Commissioner of Customs	Without any limit.
Additional / Joint Commissioner of Customs	Upto Rs.50 lakhs
Deputy / Assistant Commissioner of Customs	Upto Rs.5 lakhs

- 4.7 Notwithstanding the revision of adjudication powers, in all cases where personal hearing has been completed before such revision, orders will be passed by adjudicating authority who held the personal hearing.

[Refer Circular No.24/2011-Cus, dated 31-5-2011]

- 4.8 In case of baggage, the Additional Commissioner or Joint Commissioner shall adjudicate the cases without limit, since such cases are covered by the offences under Chapter XIV of the Customs Act, 1962 and it is necessary to expeditiously dispose such cases in respect of passengers at the airport.
- 4.9 In other cases such as short landing, the adjudication power will be the same as provided under the Customs Act, 1962 or the rules/regulations made thereunder.
- 4.10 As regards breach of condition of a notification after availing of the exemption thereunder, the Apex Court has held that that the obligation under a notification is a continuing one and the Customs authorities are well within their power to recover the duty whenever it comes to their notice that the imported has failed to fulfill the conditions. In such cases the demand can be issued irrespective of the time factor and the amount can be recovered in terms of the provisions of the Customs Act.
- 4.11 The confirmed demands are enforced and recoveries effected in accordance with the provisions of Section 142 of Customs Act, 1962. Where it is not possible to recover the amount by adjusting against any money which the Department owes to such persons, or by detaining and selling any goods belonging to such persons which are under the control of the Department, action is initiated to recover Government dues through the District Collector as if it were an arrears of land revenue. Powers are also vested with Customs for attaching/detaining and selling movable or immovable property belonging to or under control of such person.

[Refer Circular No.23/2009-Cus, dated 1-9-2009]
